Supreme Court, U.S.
FILED

98 293 MAY 20 1998

OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Mariano A. Favis, Jr., M.D.- Petitioner

VS.

Napa State Hospital, Executive Director, et al- Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mariano A. Favis, Jr. M.D.

2175 Penny Ln.

Napa, California 94559

(707) 224-7010

53 pp

QUESTIONS PRESENTED

1. Whether under the Americans With Disabilities Act the daily random assignment of readers to a blind psychiatrist (Material fact, appendix c [1,2],) constitutes a failure to accommodate the needs of a otherwise qualified employee? Was this ignored by the jury as well as the appellate court in making the decision of no violation of the ADA?

2. Whether the denial to Plaintiff of access to his peer review file was an abuse of discretion by the trial court? Is this a denial of individual constitutional rights not only for the blind handicapped but for any person in this country? Should the peer review file be part of a personnel file, so the employee can review it, especially for a court hearing?

3. Whether the narrowing down of acts of alleged discrimina-tion to a period of one year and the limitation of the hearing time to four (4) days unfairly prevented the Plaintiff from fully presenting his case to the jury? Is the failure to present preponderance of evidence or even providing foundations, which were not allowed by the judge, sufficient for the jury to make a fair decision, in order to win the case?

4. Could the defendant's witness who lies, mislead the jury in making a fair decision?

5. When the jury and the U. S. Circuit Court makes an error of finding no discrimination, would the missed continuous discrimination progress and deteriorate the hostile working environment further? Are the following several discriminatory acts submitted to EEOC from May 6, 1996 to the present, after the lower court hearing in San Francisco, direct evidence of the complications of the error in judgment?: Is the discrimination and detention of not transcribing 27 psychiatric consultations, for 4 months, further progression of uncorrected discrimination? (Appendix C [1-10])

LIST OF PARTIES

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:
The Medical Director of Napa State Hospital. Please note that the other individual defendants named in the original lawsuit are not made parties to this present petition.

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APPENDIX C Other materials essential in understanding the petition [Rule 14.1 (i) (vi)]
1. April to July 1988 Readers random assignment schedule
2. September to November 1992 random reader assignment schedule.
3. August 5, 1996 National Federation for the Blind letter in support of appeal.
4. September 25, 1996 American Foundation for the Blind letter in support of appeal.(misfiled and not included in the appellate excepts, but this can be updated for the Supreme Court).
5. February 18, 1998 Napa State Hospital (NSH) memo on discrimination by detention of transcription of psychiatric evaluations.
6. February 20, 1998 NSH memo threat of insubordination after a unilateral decision on reasonable accommodation.
7. April 27, 1998 NSH memo on some details of discrimination and detention of 26 psychiatric consultations.
8. April 29, 1998 NSH memo on trying to remove from case—part of pattern of discrimination.
9. May 5, 1998 Mention of pervasive pattern of systematic discrimination.
10. May 5, 1998 More updates of detained 27 psychiatric consultations.

APPENDIX D Civil right to have peer review file, excerpt copy of appellate brief.

TABLE OF AUTHORITIES CITED

CASES PAGE NO.

Clark v. Hoek (1985) 174 Cal.App. 3d 208, 220, 219 Cal.Rptr. 845 14

Duren v. Missouri (1979) 439 U.S. 357, 58 L.Ed. 2d 579, 99 S.Ct. 664 14

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STATUES AND RULES

OTHER

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appear at Appendix A to the petition and is

[X] is unpublished

The opinion of the United States district court appears at Appendix B to the petition and is

[X] in unpublished

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 19, 1998.

[X] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 501
42 U.S.C. 11101, et. seq.
California Civil Code Sec. 43.8
California Civil Code Sec. 43.7(b)

This case USDC #CV-94-01308-TEH (PJH), Appellate Court #96-15486, has no precedent case for appellate courts to base their decision. Therefore the Supreme Court will need to review the case for it's merit and serious impact for the working blind.

From the Common Law, the random daily assignment of the readers for the blind is a harassment, be it for a blind physician, any disabled person, or even helpers for the sighted such as a nurse, attorney, store keeper or a judge. Any frequent change of helpers even to a carpenter or a janitor will pose much more difficulty in the completion of a job.

The denial of the plaintiff/petitioner peer review file which is vital to the case hearing is a violation of individual constitutional right. The plaintiff/petitioner did not get a chance to look at the peer review file to find out whether he is mislabeled, discriminated with degrading or with insinuating remarks about his work and character. This is important to the case as several allegations and insinuations have been on going with the NSH administration, carried over in court, prejudicing the jury, and still currently on going.

STATEMENT OF THE CASE

Mariano A. Favis Jr., M.D., plaintiff/petitioner, is a qualified blind psychiatrist employed at Napa State Hospital since 1972 and is a member of a protected group pursuant to Rehab. Act. Sec. 503. Every time plaintiff/petitioner asserts and speaks out his professional opinion for difficult clinical cases, his clinical decision gets discriminated against (in closing statement).

Plaintiff/Petitioner was subjected over the course of several years, of humiliating discriminatory acts, including but not limited to, random assignment of daily readers to plaintiff/ petitioner, inappropriate transfers, referrals to peer review, removal from medical cases and threat of discharge from employment pursuant to a "Skelly" hearing in April 1993. Dr. H. Yeh of the medical unit of Napa State Hospital stated that due to his blindness (smoking gun), plaintiff/petitioner cannot work on the medical unit of Napa State Hospital. All of the aforementioned discriminatory acts were committed under the pretext of administrative actions.

At the trial court level, issues were narrowed down and the hearing of the matter was limited in scope despite requests from plaintiff's counsel to extend the trial of the matter to two weeks. Plaintiff was prevented from presenting all available evidence to the jury.

After plaintiff/petitioner lost the jury trial, the State Attorney wanted to punish plaintiff with $110,000 of attorney's fees. This follows the same trend of punishment NSH administration uses to punish plaintiff anytime he speaks out for quality patient care. The State Attorney tried to appeal the $110,000 attorney's fee to the appellate court. This was dismissed by the appellate court because appellee failed to file the brief. (Appendix A [2]).

At the appellate level there were several procedural issues raised, including plaintiff's denial of access to peer review file, the unfair narrowing of issues by the trial court and the shortening of the hearing of the case. The appellate court did not interpret Title 7 and the Americans with Disabilities Act in its broadest sense, excluding the existence of harassment and retaliation, in a hostile environment and addressed only the issue of whether plaintiff received reasonable accommodation of his disability from his employer.

REASONS FOR GRANTING THE PETITION

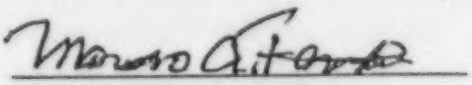
The decisions issued by the lower courts with regard to this case, if not corrected, will have a serious adverse impact on the working handicapped, especially the blind. The use of daily random assignment of readers by employers for their blind employees will be sanctioned if this Court does not reverse the lower court' decisions. The blind and other handicapped workers will be discouraged from complaining about subtle harassment and other forms of discriminatory behavior by this Court's failure to overturn the lower court rulings. The handicapped will lose interest and motivation to file complaints in court because their complaint will just be narrowed down, and trimmed to the point of losing the case. The blind who have difficulty in looking for a job will loose motivation to work because they will just get harassed. Attorneys will be hesitant to represent the blind handicapped because the chance of winning the case is slim, despite the preponderance of evidence to establish pervasive patterns of discrimination.

The lower courts' decisions to deny plaintiff/petitioner access to his peer review file was clearly erroneous at the lower court levels and should be corrected by this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Mariano Favis, Jr., M.D.
Pro se

Date: May 15, 1998

Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIANO A. FAVIS JR., MD Plaintiff-Appellant, v. NAPA STATE HOSPITAL, Executive Director, Defendant-Appelle, and Sydney Herndon; Jeffrey Zwerin, D.O., Med. Dir.; David Graziani, Clin. Dir., Dick Friday, Former Exec. Dir. Elaine Moulton, Personnel Officer; Gordon Ostrov; Ron Willis, Jackie Thompson; Judy Buckman, Diane Johnston; Regina Ott, Fanchon Jiminez,Tom Jones, George Splane, William Trefry, D.D.S., Marge Freeman, Murray Eiland, H. Yeh,) Taylor Walter;Mischwa McAdams; Nancy Martin, Janet Steele, Defendants	)	No. 96-15486 D.C. No. CV-94-01308-TEH (PJH) MEMORANDUM*

FILED
FEB 19 1998
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPPEALS

Appeal from the United States District Court for the Northern District of California Thelton E. Henderson, District Judge, Presiding

Submitted February 9, 1998**

Before: PREGERSON, CANBY, and LEAVY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Mariano A. Favis, Jr., appeals pro se the district court entry of judgment in favor of the Napa State Hospital ("Napa") following a jury trial in Favis's employment discrimination action against Napa. Favis, a blind psychiatrist, retained counsel and alleged that Napa had violated the American with Disability Act, 42 USC Sec 120101-12213, ("ADA") by subjecting him to unlawful employment practices. We have jurisdiction pursuant to 28 USC 1291. On appeal, Favis challenges numerous pretrial evidentiary hearing and a magistrate judge. We reviewed these rulings for abuse of discretion, see United State v. Komisaruk, 888 F. 2d 490, 492 (9th Cir. 1989), and we affirm.

First, we reject Favis contention that the district court abused its discretion by denying his motion to compel production of his peer review file because Favis has not demonstrated actual and substantial prejudice. See Sablan v. Department of Fin., 856 F. 2d 1317, 1321 (9th Cir. 1988); see also Martel v. County of Los Angeles, 56 F. 3d 993, 995-97 (9th Cir. 1995) (en banc) (holding that complaining party must clearly articulate what information was sought through discovery and precisely how that information would have affected the outcome of the trial). Second, the district court did not abuse it's discretion by denying Favis's motion to add multiple defendants and claims to his amended complaint because Favis failed to serve the additional defendants even after the district court instructed him to do so. Third, the district court properly denied Favis's motion to bifurcate certain issue because Favis failed to demonstrate that bifurcation was necessary. See Fed. R. Civ. P. 42(b).

We conclude that Favis has forfeited his right to seek appellate review of the magistrate judge's order addressing his motion to shorten time for interrogatories in Napa's motion to compel deposition answers, because Favis failed to object to the magistrate's nondispositive pretrial rulings rendered pursuant to 28 USC 636 (b) (1) (A). See Simpson v. Lear Astronics Corp., 77 F. 3d 1170, 1173-75 (9th Cir. 1996).

We do, however, review the magistrate order granting Napa's motion in limine because that ruling was made pursuant to 28 USC 636 (c) (1). See 28 U.S.C. 636 (c) (1) and (3).Favis contends that the magistrate judge abused her discretion by precluding him from presenting instances of alleged discrimination that Favis failed to include in his Equal Employment Opportunity Commission ("EEOC") charge.

We conclude that the magistrate did not abuse her discretion by granting Napa's motion in limine because Favis's new claim were not reasonable related to his EEOC. See Green v. Los Angeles County Superintendent of Sch., 883 F. 2d 1472, 1475-76 (9th Cir. 1989). Specifically, the new claims arose from conduct that allegedly occurred before the effective date of the ADA. See Brown v. General Tel. Co. of Cal., 108 F 3d 208, 209 (9th Cir. 1997) (per curiam).

We have considered Favis's remaining contentions regarding jury

composition and alleged procedural difficulties during trial and conclude that they are without merit.

AFFIRMED. 1/

1/ We deny Favis's motion seeking a temporary restraining order against Napa to "stop any form of discrimination with harassment."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals Docket Number: 96-15919
Lower Court Docket No.: CV-94-01308-TEH (PJH)
Short Title: Favis v. Napa State Hospital

FILED
FEB 17 1996
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPPEALS

ORDER

A review of the file in this case reveals that the appellant has failed to perfect the appeal as prescribed by the Federal Rules of Appellate Procedure.

Pursuant to Ninth circuit Rule 42-1, this appeal is dismissed for failure to comply with rules requiring processing the appeal to hearing.

A certified copy of this order sent to the district court, agency or Tax Court shall act as and for the mandate of this court.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court
"s/_____".
By: Ed Manuel
Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

Mariano A. Favis Jr., MD.,

Plaintiff,

v.

Napa State Hospital,

Defendant.

NO. C-94-1308 PJH (PJH)

Judgement

FILED
FEB X9 1996
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEB 14 1996 148
ENTERED IN CIVIL DOCKET——,19——

This action came before the Court for trial, the undersigned magistrate judge presiding. On January 29, 1996, a jury found that defendant Napa State Hospital reasonably accommodated Plaintiff Mariano A. Favis with readers to enable Plaintiff to perform the essential duties of his job, as required by the Americans with Disability Act, 42 U.S.C. 12101, et seq., and further that defendant did not discriminate against Plaintiff on the basis of his disability with regard to administrative counselings taken against Plaintiff. Consequently, IT IS ORDERED, ADJUDGED AND DECREED THAT judgement be entered in favor of Defendant against Plaintiff, and further that defendant recover from Plaintiff the costs of suit according to proof.

IT IS SO ORDERED.
Dated: February 9, 1996

"s/_____".
PHYLLIS J. HAMILTON
UNITED STATES MAGISTRATE JUDGE

Copies mailed as noted on
attached sheet.

Appendix C

1. 1988 Random Assignment of Readers schedule)
(Copied from handwritten schedule on Unit Q-11 by Jackie Thompson, Unit Supervisor)

3-15-88 Peggy
3-14-88 Dick
3-13-88 Yvonne
3-8-88 Mike
3-7-88 Mike
3-6-88 ?
3-5-88 Darryl
3-2-88 Darryl
3-1-88 Gloria

4-1-88 Gloria
4-5-88 Gloria
4-6-88 ?
4-7-88 _____
4-8-88 Shirley
4-11-88 Shirley
4-12-88 ?
4-13-88 ?
4-15-88 ?
4-18-88 ?
4-19-88 ?
4-20-88 Karen
4-21-88 Darryl
4-22-88 Shirley
4-25-88 Mike
4-26-88 Mike
4-27-88 Float
4-28-88 ?
4-29-88 Linda

5-2-88 Ken
5-3-88 Dick
5-4-88 Dick
5-5-88 Dick
5-6-88 Dick
5-9-88 Float
5-10-88 Dick
5-11-88 Mike

5-12-88 Mike
5-13-88 Ken
5-16-88 Dick
5-17-88 Teresa
5-18-88 Teresa
5-19-88 Joan
5-20-88 Dick
6-1-88 Harry
5-31-88 Dick
5-23-88 Darryl
5-24-88 Linda
5-25-88 Linda
5-26-88 Joan
5-27-88 ?
5-28-88 Dick
Dick
Dick
Shirley
Ruby
Dick
David
Dick
Dick
Dick
Dick or Linda
Linda
Linda
Skye
Float
Dick
7-29-88 Dick
7-28-88 Mike
7-27-88 Karen
7-24-88 Darryl
7-23-88 Shirley
7-22-88 Dick
7-21-88 Teresa
7-20-88 ?
7-17-88 ?
7-16-88 Darryl

2. September 1, 1992 Reader Schedule
(Copied from handwritten schedule by various readers, assigned by Kyle Ray, Supervisor Float Pool [Registry])

9-1-92 Mike
9-2-92 Float
9-3-92 Mike
9-4-92 Float
9-5-92_____
9-6-92_____
9-8-92 Mike
9-9-92 Float
9-10-92 Float
9-11-92 Mike
9-12-92_____
9-13-92_____
9-14-92 Mike
9-15-92 Float
9-16-92 Mike
9-17-92 Float
9-18-92 Float
9-19-92_____
9-20-92_____
9-21-92 Mike
9-22-92 Float
9-23-92 Mike
9-24-92 Float
9-25-92 Mike
9-26-92_____
9-27-92_____
9-28-92 Mike
9-29-92 Float
9-30-92 Float

3. Sept. 28,1992 Reader Schedule

10-1-92 Mike
10-2-92 Float
10-3-92_____
10-4-92_____
10-5-92 Mike
10-6-92 Float
10-7-92 Mike

10-8-92 Float
10-9-92 Mike
10-10-92_____
10-11-92_____
10-13-92 Mike
10-14-92 Float
10-15-92 Float
10-16-92 Mike
10-17-92_____
10-18-92_____
10-19-92 Mike
10-20-92 Float
10-21-92 Mike
10-22-92 Float
10-23-92 Float
10-24-92_____
10-25-92_____
10-26-92 Mike
10-27-92 Float
10-28-92 Mike
10-29-92 Float
10-30-92 Float

4. Nov. 1992 Reader Schedule

11-2-92 Float
11-3-92 Float
11-4-92 Float
11-5-92 Float
11-6-92 Mike
11-9-92 Float
11-10-92 Mike
11-12-92 Mike
11-13-92 Mike
11-16-92 Mike
11-17-92 Float
11-18-92 Mike
11-19-92 Float
11-20-92 Mike
11-23-92 Float
11-24-92 Mike
11-25-92 Mike
11-30-92 Float

National Federation of the Blind
1800 Johnson Street
Baltimore, Maryland 21230
(410) 659-9314

Marc Maurer, President

August 5, 1996

To the Judge in the Favis Case
Court of Appeals
San Francisco, California

Dear Judge:

Dr. Favis has asked me to comment about the use of multiple readers for a blind professional assigned on a random and continually changing basis. I am the President of the National Federation of the Blind. I am myself totally blind. I have been a practicing attorney since 1977. There are more than 50,000 members in the National federation for the Blind. In dealing with the members of the organization, I formed opinions about the best ways to use readers in the most efficient ways to handle the voluminous correspondence and substantial reading requirements.

It is my opinion that a blind person is most effective when using a reader which that person finds compatible. Ideally, the blind person should choose the reader. It takes a little time to train a reader. Therefore, it is best if a reader is assigned on an on going basis. A reader is at the direction of the blind person. Readers should not be over solicitous or handy. A reader should read with the blind person request the reader to read. The blind person should have enough sense and judgement to be able to tell the reader what kind of reading is required. Some readers insist on reading what the blind person does not want to know. Such readers should be dismissed. However, a good reader will at times tell the blind person that there is more information and that the blind person might want to know about it. In other words, the reader should have enough curiosity and intelligence to understand the general thrust of what the blind person is trying to do. In addition, the reader should have sufficient compatibility with the blind person to be able to follow directions and to understand the general purpose of the reading so that the information being sought can be gathered even if the blind person is not always aware that additional information of the same kind that has been the subject of the reading assignment is also available.

All of this means that it is better if a blind person and a reader work together on an ongoing basis. It means that shifting readers repeatedly or a random basis diminishes the effectiveness of the blind person.

I hope this gives you insight into the Favis case. The National

Federation for the blind is available to provide additional information if it is needed .

Sincerely yours,

"s/_____".
Marc Maurer, President
NATIONAL FEDERATION FOR THE BLIND

MM\lh

American Foundation For the Blind
AFB West
111 Pine Street , Suite 725
San Francisco, Ca 94111
Tel: 415.392.4845
Fax: 415.392.0383

September 25, 1996

U. S. Court of Appeals
9th Circuit
P. O. Box 193939
San Francisco, Ca 94119

Re: Mariano Favis vs Napa State Hospital
Case #: 96-15486

I am writing at the request of Dr. Mariano Favis regarding difficulties he is experiencing with the assignment of reading assistance at Napa State Hospital. I am writing this letter from two perspectives. Fist, as a professional who has worked in the field of vocational rehabilitation of persons who are blind for more than thirty years. Second from my professional association with Dr. Favis for more than 25 years.

First, I want to comment on the provision of reasonable accommodation (in this case provision of readers) for employees who are blind. Identifying the type and extent of reasonable accommodation to be jointly determined in agreed upon by both the employer and employee. With regard to reading assistance, to the extent possible, the selection, training, and supervision of the individual(s) providing the support should be under the direction of the individual needing the accommodation. Consistency is critical, particularly with highly technical and confidential medical report and information. It is not always possible to obtain this consistency but it should be considered as a high priority as it has a significant effect on the employees performance.

Secondly, I want to comment on my knowledge of Dr. Favis. I served as his rehabilitation counselor when he was going through the process of certification by the medical board. I remember him to be diligent and cooperative person who was determined to secure employment as a psychiatrist. His long service as Napa State Hospital attest to his success and achieving that goal. I cannot comment on his capabilities as a physician but I understand he has received satisfactory and above performance ratings and has received several commendation and awards. I am confident that if his current difficulties can

be resolved, he will continue to be an asset to his patients, his profession, and to the State California.

If I may provide any additional information regarding this situation, please do not hesitate to contact me.
Sincerely,

"s/_____".
Gil Johnson
Director, AFB-West

CC: Mariano Favis
Kim Settles, Attorney
GJ/ad

NAPA STATE HOSPITAL

MEMO

To: David Graziani, Clinical Administrator

Subject: Conspiring to Retaliate, Harass and Intimidate a blind Psychiatrist, after a law suit by::

1. Inappropriate Detention of Psychiatric evaluation and Transcription
2. Failure to Provide reasonable accommodation by denying Modified Equipment for the Blind for Dictation

Response to Your Memo of 2-10-98 on Telephone Dictation of Psychiatric Consultations

Date: February 18, 1998

Message:

1. I have informed, in about the first week of December 1997, Michael Stolp, Program 1 Acting Director and Judy Biggs, Acting Transcription Supervisor that I am unable to use the telephone dictating system for long and extensive dictations because of my visual handicap. J. Biggs in turn has notified her supervisor Ginger Colgrave, Director Health Information Management Department and J. Zwerin, D. O., Medical Director above the difficulties. This difficulty happened after my drastic transfer to Program 1. In their memos, M. Stolp and G. Colgrave were telling me how to do the dictation. Both are trying to tell me what a blind handicap person can do.

2. I again explained to Mr. Stolp on 2-4-98 that I cannot use the telephone in the way you want me to use it. Mr. Stolp told me that he will be talking to his "boss" which is you. (see memo dated 1-30-98)

3. I have described the difficulties in my memo dated January 14, 1998 and January 21, 1998 to Mr. John Gloekler of the State Personnel Board, manager of the Merit Appeals Section, with a copy to Mr. Stolp. (see that enclosed memo)

4. Due to J. Biggs complaining of a transcription problem from my tape recorder to the telephone dictation, I submitted to her my dictations on cassettes. Dictations on cassettes were submitted which are the same format used by the clinics and others. These were returned to me with the excuse that it is "obsolete" and you have abandoned transcribing cassettes.

5. After carefully adjusting the volume of my tape recorder, I again transmitted several dictations to the telephone in January 1998. My readers Nada, Jim and I listened to the instant reply of the telephone dictation recording and it sounded clear to us and therefore should also be clear technically when replayed in the HIMD. However J. Biggs claims it is not clear., continued to refuse and reject it, with the support of an order from her supervisor G.

Colgrave, Dr. Zwerin, and now M. Stolp.

6. To resolve the above problem I have consulted and submitted a modification of equipment by Dictaphone (who installed the NSH telephone dictation system) in the second week of December 1997. This was submitted to J. Biggs as well as to J. Gloekler, SPB using the computer already issued to me (memo submitted with price list). Everybody has continued to ignore and deny this request for reasonable accommodation. Because of the denial, UAPD has filed a complaint.

7. There are 6 dictations being inappropriately and intentional detained See handwritten note from J. Biggs on 2-13-98. There are now seven dictations which are on cassette and which are available anytime for transcription and should be done to avoid further delay. This is to avoid delay of important psychiatric recommendations. The last two are: 29-001701-2, and 29-001556-0.

8. Since you have continued to detain my psychiatric evaluation dictations by not providing me with the modification of my computer by dictaphone Corp. you are denying me reasonable accommodation according to the ADA.

9. Your denial of providing modification of dictating equipment goes along with your denial of software and digital voice synthesizer for the computer you have provided since September 1997. This computer has not been usable for me since 1997, while the other psychiatrist have fully utilized their computer that were issued. This is a denial of equal access and opportunity of the benefits of the hospital equipment/program, another violation of the ADA.

10. I consider this as further additional harassment, intimidation and retaliation done with intent and malice. This in my opinion is a violation of the ADA Sec. 36.201 (a), 36.203, 36.206, 303, 36, 306 and will be submitted to court when the right time comes.

"s_____".
M. Favis

CC: EEOC
UAPD
John Gloekler, SPB
F. Turley, Exec. Dir.
J. Zwerin, Medical Director
D. Friday, Hospital Adm.
G. Colgrave, Director HIMD
M. Stolp, A.P.D. Program 1
J. Biggs, Acting Transcription Sup.
N. Martin, Reasonable Accomod Coord.
A. Lazarro, DMH Office of Human rights
E. Montgomery, Legal division DMH

State of California Department of Mental Health

Mariano Favis, M.D.

Date: February 20, 1998
Subject: DICTATION OF PSYCHIATRIC CONSULTATIONS

Napa State Hospital
2100 Napa Vallejo Highway
Napa, Ca 94558-6293
Extension 5401

Your memorandum to me of February 18, 1998 does not provide any justification for not complying with my direction that you utilize the central dictation system as it was intended. You successfully utilized the new system on 4 occasions when assigned to Program 4, and there is no barrier that you have identified that prevent you from utilizing the same system from Program 1.

Given this, I expect you comply with my direction at once. I will consider any failure to do so on your part insubordination and take appropriate action as necessary.

If you have any question or concern, please do not hesitate to contact me.

"s/_____".
Dave Graziani
Clinical Administrator

JAC
C: Frank Turley PhD., Executive Director
Jeffrey Zwerin, D. O., Medical Director
Mike Stolp, acting Program Director
file

NAPA STATE HOSPITAL

MEMO

To: G. Colgrave, Director HIMD; J. Biggs, Acting Sup. Transcrip.

Subject: Detained Psychiatric Consultations/Evaluations Waiting for Transcription

Date: April 27, 1998

MESSAGE:I have not received the transcription of client # 29-001752-5 which was submitted to you on April 14, 1998.

The following are being submitted for transcription recorded on the NSH Lenier transcription/dictation machine which is the same equipment you have. It will be up to you whether to transcribe it in your machine or transmit it through the telephone. You may need to consult Dictaphone Corp. how to transmit the recording to the telephone, since you are not allowing or even prohibiting me to transmit the recording to the telephone.

The following was marked urgent by Program 1: #29-001653-5, consultation completed 2/17/98. Note the other side of the tape has case # 29-001556 -0, not urgent. Priority: #29-001688-1, consultation completed 2/23/98; #29-001708-7 completed 4/15/98; #29-001728-5 completed 4/16/98. #29-001704, completed 4/2/98. Note that the other side of the tape has case #29-001759-0 not a priority

All the cassettes have good audio quality and have been tested by my assistant/ readers and myself. They have been perforated on the appropriate side to avoid any chance of recording over the dictations. After you are finished, I would like the cassettes back for my file.

I will be sending the rest of the cassette recordings. There are now a total of 26 psychiatric consultations, since the memo sent to you on April 9, 1998. The last one was completed 4/24/98.

If you have any questions, please send me a memo.

"s/_____".
M. A. Favis Jr., M.D.

CC. D. Graziani, Clinic. Dir.; J. Zwerin, Med.Dir.; S. Arnold, Acting Prog. 1 Dir.; J. Steele, Labor Rel. Coord.; N. Martin, EEO Officer & Reason. Accomod. Coord.

State of California — Department of Mental Health

M. FAVIS, M. D.
Staff Psychiatrist
Program 1

Date: April 29, 1998
Subject: DICTATION

Napa State Hospital
2100 Napa Vallejo Highway
Napa, Ca 94558-6293
Extension 5434

It is clear to me that you have elected to not follow either the directions from Mr. Stolp or Mr. Graziani, regarding your dictations. As you have not provided the dictation in an acceptable format on client #29-001653-5, despite it being identified as urgent, I will reassign that case to Dr. Zunin. Please do not misconstrue this redirection to indicate that your other dictations are acceptable.

"s/_____".
Jeffrey Zwerin, D.O.
Medical Director

JZ:KG
C: Dave Graziani
Michael Stolp

NAPA STATE HOSPITAL

MEMO

To: Jeffrey Zwerin, D. O., Medical Director

Subject: 1. Detention of Psychiatric Consultation/Evaluation Transcription

2. Response to Your memo Dated April 29, 1998

Date: May 5, 1998

Message:

1. The client # 29-001653-5 you mentioned in your memo is in error and does not match the dictation # 29-001752-5 in the cassette you returned.

2. You gave an order to Dr. Zunin to redo the psychiatric consultation on # 29-001653-1, then returned the cassette dictation for # 29-001752-5. Dr. Zunin's consultation on # 29-001653-5 will be second opinion consultation, since I have already done the first follow up consultation on March 26, 1998 and it cannot be removed, as it is already part of the client's record. There is a notation on the consultation and filed on the client's chart. As a matter of fact, my second consultation refers to my initial consultation dated January 30, 1998. The cassette is being resubmitted for transcription as it is already part of the client's hospital record.

3. Rather than trying to solve the problem why Ms. Biggs is refusing to transcribe my dictations despite good play back with my transmission instead you are removing me from the case in the same pattern you have done in the past whenever there is a difference of opinion in my work.

4. You have ignored my request for modification of the dictation system as recommended by Digital Corp. to help resolve the dictation problem. The boomerang system recommended by Digital Corp. who installed the dictation system will help facilitate my dictation as a blind psychiatrist.

5. You have refused to sign my request for on-site outside evaluation for electronic accessory device for the blind by the Dept. of Vocational Rehabilitation so we can try resolve the problem with the telephone dictation. Instead you referred it to Nancy Martin, Reasonable Accommodation Officer, who so far made no reasonable accommodation for a reasonable request, creating an unnecessary delay. This has now piled my dictations to 27 from a back log of four months (see enclosed) Dr. Varshney and Dr. Zunin who have worked and do work in the same program never had any problem with their transcriptions. None of the other physicians have ever had a back log of 4 months of their dictations.

6. You have made a unilateral decision on reasonable accommodation, then turn around accusing me of not following orders and trying to threaten and add more insubordination, along with Dave Graziani, Clinical Director.

7. Your action now, including transfers of assignment, removal from cases, referral to peer review and denial to access of information with differential treatment, are all evidence of your pervasive pattern of systematic discrimination and are gross violations on Title 7 and ADA.

"s/_____".
M. A. Favis Jr., M.D.

CC: EEOC

NAPA STATE HOSPITAL

MEMO

To: Ginger Colgrave, Director Health Information Management Department
Judy Biggs, Acting Transcription Supervisor

Subject: Detained Psychiatric Consultations/Evaluations Waiting for Transcription, Update

Date: May 5, 1998

MESSAGE: I have not received any transcription on client #29-001752-5 submitted on April 14, 1998, at the request of M. Stolp P. 1 D. and the seven dictations on cassettes #'s 29-001653-5, 29-001556-0, 29-001688-1, 29-001759-0, 29-001704-6, 29-001708-7 and 29-001728-5 submitted on April 27, 1998. I have been waiting for your memo, so I can submit the remainder of the dictations, since my memo to you on April 9, 1998, but I have not received this either. Updates of the dictations have been sent to you on February 26, 1998, March 24, 1998 and April 9, 1998.

I am submitting the following cassettes for transcription. All of these are now part of the charts because the consultation forms have already been filed in the charts, with the notation "waiting for transcription." All of these are recorded on the NSH Lenier transcription/dictation machine which you have used. All the cassettes are perforated at the proper place to avoid any errors of erasure. All cassettes have been proof tested and have good audio quality. Please return them after you are through with the transcription as I need it for my file.

Cassette #	Side #	Hosp. #	Review Completed
I	1 & 2	29-001751-7	1-23-98
II	1 & 2	29-001509-9	1-23-98
III	1 & 2	29-001625-3	1-30-98
IV	1 & 2	29-001752-5	1-30-98
V	1	29-001480-3	2-04-98
V	2	29-001573-5	2-06-98
VI	1 & 2	29-001701-2	2-10-98
VII	1	29-001653-5	2-17submitted
VII	2	29-001556-0	2-18submitted
VIII	1 & 2	29-001688-1	2-23submitted
IX	1	29-001753-3	3-03-98
IX	2	29-001667-5	3-09-98
X	1	29-001492-8	3-11-98

X	2	29-001462-1	3-16-98
XI	1	29-001754-1	3-19-98
XI	2	29-001661-8	3-23-98
XI	done by hand	29-001752-5	3-26-98
XII	1	29-001759-0	3-31submitted
XII	2	29-001704-6	4-02submitted
XIII	2	29-001500-8	4-07-98
XIII	1	29-001755-8	4-09-98
XIV	1	29-001708-7	4-15submitted
XIV	2	29-001728-5	4-16submitted
XV	1	29-001504-0	4-21-98
XV	2	29-001757-4	4-24-98
XVI	1	29-001695-6	4-28-98
XVI	2	29-001546-1	4-30-98

"s/_____".
M. A. Favis Jr., M.D.

c.c. M. Stolp, P. 1 D.
J. Zwerin, D.O., M.D.
N. Martin, E.E.O.O. & R.A.C.

Appendix D

FEDERAL CASE LAW CLEARLY SUPPORTS APPELLANTS'S CLAIM THAT HE SHOULD HAVE BEEN GRANTED ACCESS TO HIS PEER REVIEW FILE AT THE DISTRICT COURT

There is ample case law to support appellants's claim that the peer review materials he sought during discovery could have been provided to appellant. It is well-established law that the privileges asserted by defendants do not apply in civil right's action, federal antitrust action, nor do they apply for the actions of the participants in the peer review process conducted for improper purposes. Appellant recognizes that "[t]here is a strong public interest in supporting, encouraging an protecting effective medical peer review programs and activities." Clarke v. Hoek (1985) 174 Cal. App. 3d 208, 220, 219 Cal. Rptr. 845. However, when the communications in question are made for purposes other than to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing .... arts (Civil code 43.8) and when the communications are made with malice (Civil Code 43.7 (b)) the privileges asserted by defendant do not apply. When the purpose of the communications is to further an illegal discriminatory pattern of treatment toward plaintiff as plaintiff has alleged, then the privilege asserted by Defendants do not apply. Likewise, where plaintiff does not receive adequate notice and proper hearing procedures are not observed the immunities provided by HCQIA, 42 USCA 11101, et seq. do not apply.

In LeMasters v. Christ Hosp. (1991, S.D. Ohio, W.D.) 791 F. Supp. 188, the District Court heard a Title VII action alleging sex discrimination and illegal retaliation brought by a female physician. There the Court was called upon to decide whether peer review information was privileged and therefore not discoverable under an Ohio statute granting a privilege to proceedings of a peer review committee. The Court based it's rulings in part from Federal Rule of Evidence 501 which states in pertinent part:

> Except as otherwise required by the Constitution of United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the court of United States in the light of reason and experience ....

and concluding that in federal question cases, eg., an illegal discrimination state privilege law did not apply.

The LeMasters court cautioned that because rule 501 refers to "reasons and experience" they were free in federal question cases to apply

state privilege law by analogy or as a matter of comity. The LeMasters court then attempted to balance the compelling interest and came to the conclusion that the balance weighed in favor of granting Plaintiff the right to discovery of peer review matter stating that "... the plaintiff's right to be free from discrimination and her need for information sufficient to prove her allegation outweigh the defendants' desire for confidentiality." LeMasters @ 191.

The LeMasters court also addressed the confidentiality provision of the HCQIA and likewise found that privilege found therein did not prevent plaintiff from conducting her desired discovery.

> "As Representative Waxman, a principal sponsor of the Act, stated, "the immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions that violate civil right's act or actions that are really taken for anticompetitive purposes will not be protected under this bill." 141 Cong. Record H 9957 (Daily Ed. Oct. 14, 1986). therefore the Health Care Quality improvement act of 1986, 42 USC 11101 et seq., cannot be construed as limiting discovery in a sex discrimination action. LeMasters @ 191.

The court in LeMasters also found that where, as is alleged here by Plaintiff, all the protections of the HCQIA are not observed then the protection of the Act do not apply. Id. In LeMasters the physician in question was not appraised of her right to be represented by an attorney at an administrative hearing while in the case of bar Plaintiff has alleged that she was not provided proper notice of the hearings in question.

In Memorial Hospital for McHenry County v Shadur (1991) 664 F. 2d 1058 the Court dealt with a similar issue and came to a similar conclusion. Again the court was dealing with allegations of unlawful discrimination and unlawful restriction of trade. The plaintiff therein sought discovery of evidence that other physicians with comparable or worse records were not denied staff privileges as he was. The Court followed the same analysis as the LeMasters court first looking to Federal Rule of Evidence 501 as the claims advanced by Plaintiff were federal questions.

> First, because evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored and, where recognized must be narrowly construed. United Sates v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). Second, in deciding whether the privilege asserted should be recognized, it is important to take into account

the particular factual circumstances of the case in which the issue arises. The court should "weighed the need for truth against the employees of relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case. Ryan v. Commissioner of Internal Revenue, 568 F. 2d 531, 543, (7th Cir. 1977), cert. denied, 439 U.S. 820, 99 S. Ct. 84, 58 L. Ed. 2d 111 (1978).

Memorial Hospital supra @ 1061-62.

The Memorial Hospital Court further discussed the reason behind their conclusion that the proceeding of the disciplinary proceeding were discoverable by stating that,

> To recognize hospital disciplinary proceedings privilege, regardless of the purpose for which disclosure is sought, would in effect grant such committees, their members and participants absolute immunity from prosection for all statements made and actions taken in the context of such proceedings. ... The Public interest and private enforcement of federal antitrust law ... is simply too strong to permit the exclusion of relevant and possible crucial evidence of the Hospital's privilege.

Memorial Hospital supra @ 1063.

Likewise in Pagano v. Oroville Hospital 145 F.R.D. 683 (E.D. Cal. 1993) California's medical peer review privileges were found to be inconsistent with federal law which did not recognize them and, were therefore, inapplicable. That case too, involve a Plaintiff alleging violation under the Sherman antitrust Act, a federal question just as Appellant's is herein. The Pagano court stated:

> "When there is a clear inconsistency — for example, the state privilege is absolute and in it's application while the federal is qualified, or the federal courts have explicitly rejected a federal privilege analogous to an asserted state privilege— state privilege law should not apply," concluding "that while "the court "cannot apply California's statutory physician-patient and peer review privilege, California's right to privacy may be considered in determining the contours of a privilege of a nondisclosure." Pagano @ 688.

In civil right's violation s cases an anti-trust violations cases the court concluded that it would be difficult for the plaintiff to argue and prove his or her case without having access to the materials contained in the Defendant's hospital's peer review files. The court cited Teasdale v. Marin General Hospital 138 F.R.D. 691, 694 (N.D. Cal. 1991) for the proposition that the "[f]ederal courts in the Ninth Circuit have yet to adopt California's peer review privilege." Pagano @ 692. The Pagano court went on to state:

> Observing the reluctance of the Supreme Court to create privileges, and noting that the weight of federal authority does not recognize either a peer review or self-critical analysis privilege, this court will not recognize either privilege in the federal common law, at least in settings where the peer review or self-analysis themselves are under attack. Pagano @ 692.

The Pagano court also considered whether or not the HCQIA provided a medical peer review privilege in the context of an antitrust action. The court found that the HCQIA itself inferred support of disclosure when the legitimacy of a medical peer review committee proceeding was at issue. Pagano @ 693.

In Teasdale v. Marin General Hospital 138 F.R.D. 696 (N.D. Cal. 1991), another Sherman Anti-Trust Act case, the court concluded that discovery of peer review materials was permissible despite privacy concerns. "As to the asserted privacy interest, the court is not persuaded that they outweigh plaintiff's interest in the discovery, which may well go to the heart of plaintiff's case, the important public interest in antitrust enforcement, and the vital public interest in the discovery of all probative evidence." Teasdale @ 699-700.

Making its ruling denying Appellant the right to have access to the peer review files he requested the court cited Wei v. Bodner, 127 F.R.D. 91 (D.N.J. 1989) as authority for its decision to allow in camera review by the court of the materials. The Wei court followed the same course of analysis as the cases previously cited by Appellant, namely, looking first to determine whether federal or state privileges were controlling. "Where as here, there are both federal and state law claims, federal privileges rather than state privileges apply to all claims. Wm. T. Thompson Co. V. General Nutrition Corp., Inc., 671 F 2d 100 (3d Cir. 1982)" Wei @ 94.

The Wei court went on to address the strength of statutory peer review privileges in relation to the Plaintiff's desire for access to the those materials.

Despite the advantages gained by statutory peer review privileges, courts have consistently held that these policies to be outweighed by the policies behind federal anti-trust laws. (Footnote). See, eg., Memorial Hospital, Quinn v. Kent General Hospital, Inc., 617 F. Supp. 1226 (D.Del. 1985), Robinson, Jiricko and Dortsen v. Lapeer County General Hospital, 88 F.R.D. 583 (E.D. Mich. 1980). Since the discovery sought goes directly to the substance of antitrust claims and since the peer review committee can be sued for anticompetitive purposes, the need for confidentiality is outweighed by the need for disclosure.

The defendant, at argument conceded that in no known reported case has the privilege outweighed the federal antitrust policies. (emphasis added). Wei @ 99.

The Wei court went to distinguish malpractice action (where the privilege applied) from anti-trust actions (where the privilege did not apply), stating that:

> ... anti-trust suit are different from the malpractice content in which the self-evaluative privilege first arose. Rather, it is whether the there was negligence. ... In contrast, in an anti-trust action where a physician is suing a hospital and others for anticompetitive actions, the claim arises directly from that process. In the former type of situation, where the evaluative process is the source of information to support a claim independent of the review process, the privilege should prevail and disclosure should not be ordered. Where, as here, the parties seeking discovery seeks redress from the evaluative process itself, the privilege must follow in favor of greater interests.
>
> Because of the overwhelming public interest of the Sherman act, and other federal interest, neither the state or federal self-evaluative privileges are applicable... (Emphasis added). Wei @ 101.

Just as in Sherman act antitrust case, discrimination cases as in the case in bar seek information regarding the evaluated process itself and not seeking information to support a claim independent of the review process. Thus the same logic the Court applied in Wei regarding the disclosure of the peer review material should have been applied to appellants request and Appellant should have been allowed access to the peer review materials himself.. The Wei case thus support's Appellant's case and justifies a ruling

in favor of Appellant allowing him access to the peer review materials he requested.

APPELLANT'S CONSTITUTIONAL RIGHT TO A JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY WAS VIOLATED

Appellant also contends that his constitutional right to a jury selected from a fair cross-section of the community was violated. The Supreme Court has established the following test for assessing whether the Sixth Amendment right has been violated. Taylor v. Louisiana (1975) 419 U.S. 522, 42 L.Ed. 2d 690, 95 S.Ct. 692 and Duren v.Missouri (1979) 439 U.S. 357, 58 L.Ed. 2d 579, 99 S.Ct. 664. 1) The group alleged to have been excluded must be a "distinctive" group in the community, (e.g., Asians); 2) The representation of the group in venires from which juries are selected must not be fair and reasonable in relation to the number of such persons in the community; and the underrepresentation must be due to a systematic exclusion of the group in the jury selection process.

Appellant herein asserts that those of Asian descent and heritage were unlawfully excluded. In determining whether a group is cognizable for the purpose of a challenge to a jury selection plan, the following considerations are pertinent: (1) there must exist some quality or attribute which defines or limits the alleged group (2) there must exist cohesiveness of attitude, ideas, or experience which distinguishes the group from the general social milieu, and (3) a community of interest must be present which may not be represented by other segments of the population. See, e.g. United States v. Smith (1979, ED Wis) 463 F.Supp. 680; United States v. Black Bear (1989).